

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

28659

FILE: B-213344

DATE: June 28, 1984

MATTER OF: Inco, Inc.

DIGEST:

1. Inclusion of initial technical proposal in competitive range does not necessarily establish that proposal was technically acceptable, since agency may properly include proposals that may become acceptable through discussions. Subsequent rejection of proposal as technically unacceptable because best and final offer did not cure deficiencies pointed out to offeror is upheld when protester has not disputed technical ranking or agency's commentary concerning protester's deficiencies.
2. Claim for proposal preparation costs is denied where government was not arbitrary in rejecting proposal.

Inco, Inc. (Inco), protests the award of a contract to the Control Data Corporation (CDC) under request for proposals (RFP) No. MDA902-83-R-0008, issued by the Armed Forces Radio and Television Service (AFRTS). Inco contends that AFRTS erred in finding its proposal to be technically unacceptable and argues that, as the lowest priced, technically acceptable offeror, it should have been awarded the contract.

We deny the protest because we find that Inco has not shown that the AFRTS determination of technical unacceptability was unreasonable.

The solicitation was for a requirements analysis, feasibility study, and preliminary functional description of a worldwide management information system. The RFP included the following statement concerning evaluation of offers and award of the contract:

"Technical excellence is mandatory to preclude excessive system implementation and maintenance costs during the system's life cycle.

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Technical quality (as indicated by Technical Approach and Corporate Experience) is considered of primary importance.

"Evaluation of offers will be accomplished in two steps. All factors except cost will be evaluated in step one. Of these factors, Technical Approach (M1) and Corporate Experience and Capacity (M4) are considered equal to each other and twice as important as all other factors considered in step one (M2 and M3). All offers which are considered technically acceptable under the first step of evaluation will be evaluated for price realism in step two. Award will be made to the responsible offeror whose offer is technically acceptable and who has the lowest realistic price."

The RFP then listed the detailed subfactors of which the main factors were comprised.

Five proposals were received in response to the solicitation and were subjected to a technical evaluation. Two proposals were found to be technically unacceptable. Of the three other proposals, CDC's proposal was rated highest, another offeror's proposal was rated second, and Inco's proposal was rated last. According to AFRTS, Inco's proposal was a "borderline" case, but was included in the competitive range with the two acceptable proposals because it was thought that through discussions and revision, Inco's proposal might become technically acceptable.

Technical and price discussions were held with all three offerors included in the competitive range. Inco was asked the most technical questions which centered primarily around an evaluated lack of management analysis experience and expertise. All three offerors were asked for and responded with best and final offers. The technical scores of all offers increased, but the relative rankings and distances between the three offers remained about the same.

AFRTS found Inco's proposal to be technically unacceptable because it had not adequately responded to the technical questions posed during discussions. Essentially, AFRTS concluded that Inco's proposal did not demonstrate the

level of management analysis experience and expertise that would be required to successfully perform the contract. Since AFRTS did not consider Inco's proposal to be technically acceptable, it did not analyze Inco's proposed price for realism.

The best and final prices of the three offerors in the competitive range were: Inco - \$393,742; CDC - \$420,000; the third firm - \$439,580. AFRTS awarded the contract to CDC as the lowest priced, technically acceptable offeror.

AFRTS discovered after the protest was filed that the technical evaluators had inadvertently weighted the Technical Approach and Corporate Experience factors three times the other technical factors rather than the RFP specified two times. As part of its response to the protest, AFRTS provided a reevaluation chart using the original scoring percentages of points with the proper weights. The chart shows that the rankings and relative scores were not significantly affected by the misweighting. Consequently, AFRTS concluded that its original determinations concerning the technical acceptability of Inco's proposal and the award of the contract to CDC remained valid. Inco does not argue that the misweighting of the initial evaluation made any difference in the rankings, and the rescoring charts show that as the case. Therefore, we will not consider this as an issue in the protest.

Inco argues that its technical proposal was not technically unacceptable. As support for this contention, Inco points out that its initial technical proposal was included in the competitive range for discussions, and that it was asked for a best and final offer. Inco also points to a Board of Awards form dated after best and final offers which lists Inco's offer among the technically acceptable offers rather than among the technically unacceptable offers.

AFRTS's response is that Inco's initial proposal was included in the competitive range not because it was technically acceptable, but rather because it was considered deficient, but capable of being made technically acceptable through discussions. According to AFRTS, it is legally proper to include such a proposal in the competitive range

and later to find it technically unacceptable if it does not improve sufficiently after discussions and a revised best and final offer. Further, AFRTS states that it is required to adhere to the format in completing the Board of Awards form. That format provides only entries for technically acceptable and technically unacceptable firms. It does not provide a category for firms that were initially potentially acceptable, but finally unacceptable. AFRTS states that it listed Inco in the acceptable category because only that category permitted both initial and final technical ratings to be entered for each offeror. Since the format was required to be strictly followed, AFRTS was forced to list Inco in that category.

It is proper, and in fact preferable, to include in the competitive range proposals that are not technically acceptable, but that may become acceptable through discussions. Eastern Marine, Inc., B-213945, March 23, 1984, 84-1 C.P.D. ¶ 343. Consequently, the fact that a proposal is included in the competitive range does not necessarily mean that it was found to be technically acceptable. Also, once such a proposal is included in the competitive range, it may properly be rejected as technically unacceptable either before or after best and final offers if it has not become technically acceptable. Eastern Marine, Inc., B-213945, *supra*; A. T. Kearney, Inc., B-205025, June 2, 1982, 82-1 C.P.D. ¶ 518. Therefore, we find unpersuasive Inco's argument that the inclusion of its proposal in the competitive range and the request for a best and final offer show that its proposal was technically acceptable.

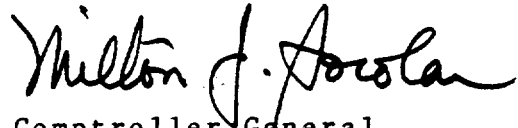
Additionally, we find Inco's argument concerning the Board of Awards form to be an exaltation of form over substance. AFRTS has provided technical rankings and substantive commentary concerning Inco's deficiencies in support of its finding that Inco was technically unacceptable. Inco has not disputed the rankings or the deficiencies, but has only pointed to matters of form. We find that this does not satisfy the protester's burden of showing that the agency's finding of technical unacceptability was unreasonable.

Inco also complains that the evaluation was not done in the "two-step" process contemplated in the RFP. That is, AFRTS did not first make a final determination of technical

acceptability before considering price. Rather, AFRTS held technical and price discussions together.

In our view, AFRTS complied with the RFP. The evaluation provision states that only technically acceptable offerors will be evaluated for price realism. It does not state that technical and price discussions will be separate or that only technically acceptable offerors will be permitted to submit a price. In this instance, only technically acceptable offerors' prices were evaluated for price realism. In any event, we fail to see how the merging of price and technical discussions prejudiced Inco in connection with the award of the contract.

Finally, Inco requests proposal preparation costs in the event that its protest is denied. Such costs can only be recovered, however, if the government has acted arbitrarily in rejecting a proposal. Burroughs Corporation, B-211511, December 27, 1983, 84-1 C.P.D. ¶ 24. In view of our conclusions above, we deny the claim.



Acting Comptroller General
- of the United States